A

CIMB BANK BHD v. VEERAN AYASAMY (WAKIL DIRI KEPADA LETCHIMI MUTHUSAMY, SI MATI)

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
LIM YEE LAN JCA
B MOHD ZAWAWI SALLEH JCA
[CIVIL APPEAL NO: P-02-2394-09-2011]
22 JUNE 2015

C ***CIVIL PROCEDURE:*** *Fraud – Conspiracy to defraud – Allegations of – Sale of land and house – Purchaser paid full purchase price but land not transferred – Allegation that issue document of title destroyed in fire – Discovery that land transferred to another – Land charged to bank as security for loan – Allegations of fraud and/or conspiracy by bank – Whether particulars of fraud and/or conspiracy against bank pleaded – Whether fraud and/or conspiracy proved – National Land*
D *Code, s. 340(2)*

LAND LAW: *Transfer – Fraud – Sale of land and house – Purchaser paid full purchase price but land not transferred – Allegation that issue document of title destroyed in fire – Discovery that land transferred to another – Land charged to bank as security for loan – Allegations of fraud and/or conspiracy by bank – Whether*
E *transfer of land and subsequent execution of charge defeasible – Whether allegations of fraud and/or conspiracy proved – National Land Code, s. 340(2)*

The first defendant had sold a land together with a house built on it to the deceased (the plaintiff in the High Court). The plaintiff had duly paid the full
F purchase price of the said land but the same was not transferred to the plaintiff as it alleged that the issue document of title was destroyed in a fire. However, the plaintiff later discovered that the property was transferred to the second defendant. The second defendant applied to the appellant ('the third defendant') for a loan of RM776,786 and the second defendant executed a charge for the said land in favour of the third defendant as security for the
G repayment of the said loan. In the High Court, the plaintiff claimed that the transfer of the said land from the first defendant to the second defendant and the subsequent execution of charge in favour of the third defendant was defeasible pursuant to s. 340(2) of the National Land Code and were liable to be set aside on grounds of fraud and/or conspiracy. The High Court held
H in favour of the plaintiff and hence, the present appeal. The issues that arose for the court's determination were: (i) whether the plaintiff pleaded particulars of fraud and/or conspiracy against the third defendant in the statement of claim; and (ii) whether the plaintiff had proved her claim against the defendant.

I

Held (allowing appeal; setting aside decision of High Court)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) As a general rule, the more serious the allegations of misconduct, the greater the need for the particulars to be given which explains the basis for the allegation. The particulars did not reveal that the issue of fraud had been raised and the particulars of conspiracy were vague and general. The plaintiff did not provide the particulars in respect of the third defendant's involvement and how the conspiracy took place. Such vague and general averments of fraud and/or conspiracy did not assist the plaintiff. The third defendant could not be expected to meet a case upon mere allegations of fraud and/or conspiracy without any definite particulars being furnished. (paras 19, 20 & 21)

(2) The heart of the High Court Judge's ('HCJ') decision was that the failure on the part of the third defendant to make any enquiry with regard to the plaintiff's occupation of the said property and to take any action to evict the plaintiff was sufficient to defeat the third defendant's interest in the said property. The HCJ fell into error in making such a finding. The alleged failures were insufficient to establish fraud and/or conspiracy. The elements of fraud and/or conspiracy must be proved by clear, cogent and convincing evidence. There must be something more than mere failure or an omission on the part of the third defendant. There was hardly any evidence from which fraud and/or conspiracy could reasonably be inferred. (paras 27 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Defendan pertama telah menjual sebidang tanah bersama-sama dengan sebuah rumah yang terbina di atasnya kepada si mati (plaintif di Mahkamah Tinggi). Plaintif telah membayar harga belian penuh tanah tersebut tetapi ia tidak dipindah milik kepada plaintif kerana didalihkan bahawa dokumen hak milik keluaran telah musnah dalam satu kebakaran. Walau bagaimanapun, plaintif seterusnya mendapati bahawa hartanah tersebut telah dipindah milik kepada defendan kedua. Defendan kedua memohon daripada perayu ('defendan ketiga') bagi pinjaman sebanyak RM776,786 dan defendan kedua menyempurnakan satu pajakan ke atas tanah tersebut bagi defendan ketiga sebagai cagaran untuk pembayaran semula pinjaman tersebut. Di Mahkamah Tinggi, plaintif mendakwa bahawa pindah milik tanah tersebut daripada defendan pertama kepada defendan kedua dan penyempurnaan pajakan bagi defendan ketiga boleh disangkal di bawah s. 340(2) Kanun Tanah Negara dan boleh diketepikan atas alasan penipuan dan/atau konspirasi. Mahkamah Tinggi memutuskan berpihak kepada plaintif dan dengan itu, rayuan ini. Isu-isu yang timbul bagi pemutusan mahkamah adalah (i) sama ada plaintif memplidkan butiran mengenai penipuan dan/atau konspirasi terhadap defendan ketiga dalam penyata tuntutan; dan (ii) sama ada plaintif berjaya membuktikan tuntutannya terhadap defendan.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Sebagai satu peraturan umum, semakin serius dakwaan-dakwaan salah laku, semakin tinggi keperluan yang perlu diberikan untuk menjelaskan asas dakwaan tersebut. Butiran-butiran tidak mendedahkan bahawa isu penipuan telah dibangkitkan dan butiran-butiran konspirasi adalah samar-samar dan umum. Plaintif tidak mengemukakan butiran-butiran berkenaan penglibatan defendan dan bagaimana konspirasi tersebut berlaku. Hujahan-hujahan penipuan dan/atau konspirasi yang samar-samar dan umum tidak membantu plaintif. Defendan ketiga tidak boleh dijangka memenuhi satu-satu kes hanya berdasarkan dakwaan-dakwaan penipuan dan/atau konspirasi tanpa sebarang pengemukaan butiran-butiran khusus.

(2) Intipati keputusan Hakim Mahkamah Tinggi ('HMT') adalah bahawa kegagalan defendan ketiga untuk membuat pertanyaan mengenai penghunian hartanah tersebut dan untuk mengambil tindakan mengusir plaintif cukup untuk melemahkan kepentingan defendan ketiga ke atas hartanah tersebut. HMT terkhilaf dalam membuat dapatan sedemikian. Kegagalan-kegagalan yang didakwa tidak cukup untuk membuktikan penipuan dan/atau konspirasi. Elemen-elemen penipuan dan/atau konspirasi mesti dibuktikan oleh keterangan yang jelas dan meyakinkan. Mesti terdapat lebih daripada sekadar kegagalan atau ketinggalan oleh defendan ketiga. Hampir tiada sebarang keterangan di mana penipuan dan/atau konspirasi boleh disimpulkan secara munasabah.

Case(s) referred to:

Asari @ Asha'ari Mohd Amin v. Zainalabidin Mohamed Husain [2012] 1 LNS 165 HC ***(refd)***

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Davy v. Garrett [1878] 7 Ch D 473 ***(refd)***

Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168 SC

John Wallingford v. Mutual Society and the Official Liquidator [1880] 5 App Cas 685 ***(refd)***

Malayan Banking Bhd v. Lim Tee Yong & Ors [1994] 4 CLJ 558 HC ***(refd)***

Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Three Rivers District Council & Ors v. Governor and Company of The Bank of England [2003] 2 AC 1 ***(refd)***

Legislation referred to:

National Land Code, s. 340(1), (2)

Other source(s) referred to:

Mallal's Supreme Court Practice, 4th edn, pp 204 to 205

For the appellant - Cynthia Lee Bee Gaik; M/s Anual & Foong
For the respondent - Yagoo Subramaniam; M/s Yagoo & Assocs

[Editor's note: For the High Court judgment, please see Letchimi Muthusamy lwn. Guan Joo Seng Company Sdn Bhd & Ors [2012] 1 LNS 1379.]

Reported by Najib Tamby

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] For convenience, in this judgment, we will refer to the parties in the manner they were referred to in the High Court.

[2] This appeal is from the decision of the learned judge of the High Court of Penang given on 21 August 2011. The High Court had granted the following reliefs prayed for by the plaintiff:

(i) a declaration that the plaintiff was the beneficial owner of a property known as Lot 3070, Bandar Gelugor, Daerah Timur Laut, Penang held under Geran No. 43279 together with premises erected thereon with the postal address of No. 16, Jalan 3, Changkat Minden, Sungai Gelugor, 11700 Gelugor, Penang (the said property);

(ii) a declaration that the first defendant was a bare trustee of the said property;

(iii) a declaration that the transfer *vide* presentation No. 7588/2004 on behalf of the first defendant to the second defendant was null and void;

(iv) a declaration that the charge *vide* presentation No. 7589/2004 executed by the second defendant in favour of the third defendant was invalid;

(v) the first defendant was ordered to transfer the said property to the plaintiff within 14 days, failing which the Registrar of the Court is empowered to execute a transfer on behalf of the first defendant; and

(vi) the Registrar of Titles was ordered to give effect to the orders stated above.

[3] We heard the appeal on 14 February 2014. At the conclusion of the submissions, we allowed the appeal and set aside the decision of the learned High Court Judge, but with no order as to costs.

[4] We now set out our reasons for the decision.

The Facts

[5] The facts giving rise to the appeals in a nutshell are that at the material time, the plaintiff, since deceased, occupied a house No. 548F, Bandar Gelugor, Daerah Timur Laut, Penang. The land on which the house stood

A was sold to the first defendant. The plaintiff agreed to the first defendant's proposal to vacate the house and moved to a temporary housing. The first defendant was to compensate the plaintiff with another premises constructed by the first defendant, provided that the plaintiff purchased the land. This land is now the subject matter of the present appeal.

B **[6]** *Via* a sale and purchase agreement dated 1 August 1972, the first defendant sold the said property together with the premises erected thereon to the plaintiff. The plaintiff had duly paid the full purchase price of the said land but the said land was not transferred to the plaintiff because the first defendant had alleged that the issue document of title was destroyed by fire C which occurred at the first defendant's premise.

[7] However, in 2006, the plaintiff discovered that the property was transferred to the second defendant. The second defendant applied to the third defendant for a loan of RM776,786. The second defendant executed a charge of the said land in favour of the third defendant as security for the D repayment of said loan.

[8] The plaintiff claimed that the transfer of the said land from the first defendant to the second defendant and subsequently the execution of the charge in favour of the third defendant was defeasible pursuant to s. 340(2) of the National Land Code (NLC) and were liable to be set aside on the E grounds of fraud and/or conspiracy.

Findings Of The High Court

[9] The principal findings of the High Court may be summarised as follows:

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(i) the plaintiff is the beneficial owner of the said land and the first defendant is a bare trustee for the benefit of the plaintiff by reason of the payment of full purchase price of the said land under the first agreement;

(ii) the transfer of the said land by the first defendant to the second defendant G is defeasible by reason of the fraud and/or conspiracy committed by the first and second defendants against the plaintiff;

(iii) the charge of the said land by the second defendant to the third defendant is also defeasible by reason of the fraud and/or conspiracy committed by all the three defendants together; and

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(iv) the plaintiff's action is not barred under the Limitation Act 1953 because the plaintiff is in possession of the said land all along after her purchase from the first defendant as equitable owner and the first defendant is a bare trustee of the said land for the benefit of the plaintiff until the registration of the transfer of the said land in favour of the I plaintiff.

[10] The first and second defendants did not appeal against the learned judge's decision. A

The Appeal

[11] Before us, learned counsel for the third defendant articulated two issues for determination as follows: B

(a) whether the learned judge erred in fact and in law in failing to hold that the plaintiff has failed to plead in the statement of claim particulars of fraud and/or conspiracy against the third defendant; and

(b) whether the learned judge erred in law and in fact in holding that the plaintiff has proved her claim against the defendants. C

Issue (a): No Particulars Of Fraud And Conspiracy Pleaded In The Statement Of Claim

[12] Learned counsel for the third defendant submitted that no assertions or particulars of any fraud and/or conspiracy were made or furnished in the statement of claim. Therefore, the learned judge was plainly wrong to have found that a fraud and/or conspiracy had been perpetrated on the plaintiff. D

[13] In reply, learned counsel for the plaintiff submitted that there were general assertions of fraud and/or conspiracy in paras. 10 and 11 of the statement of claim and this fact was acknowledged by the learned judge. E

[14] Now, lawyers dealing with civil litigation have been traditionally been admonished to treat the issue of alleging fraud very cautiously and carefully. Lord Selborne LC in *John Wallingford v. Mutual Society and the Official Liquidator* [1880] 5 App Cas 685 at p. 697 stated the general rule. He said: F

> With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.

(See also *Malayan Banking Berhad v. Lim Tee Yong & Ors* [1994] 4 CLJ 558; [1994] 3 MLJ 715 where Mohd Hishamudin Yunus JC (as he then was) referred and agreed with the above statement). G

[15] In *Davy v. Garrett* [1878] 7 Ch D 473, Thesiger LJ at p. 489 acknowledged the principle as follows:

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> In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts … It may be not necessary in all cases to use the word "fraud" … It appears to me that a Plaintiff is bound to shew distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. I

[16] In *Mallal's Supreme Court Practice*, 4th edn, at pp. 204 to 205, it is stated that:

> Particulars of fraud must be pleaded. A general allegation of fraud, however strong the words used, where there is no statement of circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any court ought to take notice: *John Wallingford v. The Directors of the Mutual Society and the Official Liquidator thereof* (1879-80) 5 App Case 685 at pp 697, 701 and 709.

[17] It is pertinent to note that it is the function of pleadings, including particulars, to apprise the opposite party of the case to be met. The following judicial statements outlined the function of pleadings and particulars:

> Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it … they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial … and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. (See *Dare v. Pulham* (1982) CLR 658 at 664).
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> The function of pleadings is to state with sufficient clarity the case which must be met. … In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. (See *Banque Commerciale SA, En Liquidation v. Akhil Holdings Ltd* (1990) 169 CLR 279 at 286).
>
> Particulars fulfil an important function in the conduct of litigation. They define the issues to be tried and enable the parties to know what evidence it will be necessary to have available and to avoid taking up time with questions that are not in dispute. On the one hand they prevent the injustice that may occur when a party is taken by surprise; on the other they save expense by keeping the conduct of the case within due bounds. (See *Bailey v. Federal Commissioner of Taxation* (1977) 136 CLR 214 at 219).

[18] In this instant appeal, the plaintiff only pleaded fraud and/or conspiracy in paras. 10 and 11 of the statement of claim. The paragraphs read as follows:

> [10] Plaintiff plid bahawa Defendan Kedua telah menggadaikan hartanah tersebut kepada Defendan Ketiga dengan penuh pengetahuan akan hak-hak Plaintiff di atas hartanah tersebut dan dengan pengetahuan penuh akan kewujudan premis tersebut yang dihuni oleh Plaintiff di atas hartanah tersebut dan Plaintiff plid Defendan Ketiga telah menerima gadaian hartanah tersebut dengan penuh pengetahuan akan hak-hak Plaintiff di atas hartanah tersebut.
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> [11] Plaintiff plid bahawa Defendan Pertama, Defendan Kedua dan Defendan Ketiga telah berkomplot dan berkonspirasi dengan niat untuk menafikan hak-hak plaintiff di atas hartanah tersebut dan dengan niat untuk menafikan penghunian yang dikecapi oleh Plaintiff dalam premis tersebut yang didirikan di atas hartanah tersebut.

[19] As can be readily observed, the foregoing particulars did not reveal that the issue of fraud has been raised and the particulars of conspiracy are vague and general.

[20] The plaintiff alleged that the third defendant/bank was aware of her rights and interests over the said property and conspired with the other defendants to deny the plaintiff's rights. However, the plaintiff did not provide the particulars in respect of the bank's involvement and how the conspiracy took place. Such vague and general averments of fraud and/or conspiracy did not assist the plaintiff. The third defendant cannot be expected to meet a case upon mere allegations of fraud and/or conspiracy without any definite particulars being furnished.

[21] It is clear that as a general rule, the more serious the allegations of misconduct (fraud and/or conspiracy in the instant appeal), the greater is the need for the particulars to be given which explain the basis for the allegation.

[22] In *Three Rivers District Council & Ors v. Governor and Company of The Bank of England* [2003] 2 AC 1, Lord Millet said at paras. 184 and 186:

> 184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on *Fraud and Mistake* 7th Ed (1952), p 644; *Davy v. Garrett* (1878) 7 Ch D 473, 489; *Bullivant v. Attorney Genera; for Victoria* [1901] AC 196; *Armitage v. Nurse* [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
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> …
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> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.

A **[23]** On this ground alone, the plaintiff's claim against the third defendant should be dismissed. However, assuming we are wrong in holding that paras. 10 and 11 of the statement of claim are insufficient to give notice of the alleged fraud and/or conspiracy committed by the third defendant, we shall now proceed to consider the evidence adduced during the trial.

B *Issue (b): Whether Fraud And/Or Conspiracy Proven*

[24] It is not disputed that the third defendant is the registered chargee of the said property. Therefore, the third defendant's interest in the said property is in defeasible. (See s. 340(1) of the National Land Code 1965). In order for the third defendant's interest to be set aside, the plaintiff has to C establish fraud. (See *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] MLJU 10).

[25] The onus is on the plaintiff to prove fraud beyond reasonable doubt (See *Saminathan v. Pappa* [1980] 1 LNS 174; [1981] 1 MLJ 121, *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34, *M Ratnavale v.* D *S Lourdenadin* [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168; [1988] 2 MLJ 371). It is only after the plaintiff has succeeded in discharging her burden of proof then the onus shifts to the third defendant to prove that they are the *bona fide* chargee for value.

E **[26]** The evidence adduced by the plaintiff can be summarised as follows:

(i) the third defendant did not make any enquiry with regard to the plaintiff's occupation of the said property;

(ii) the third defendant did not take any action to evict the plaintiff or to F counterclaim claim for vacant possession; and

(iii) plaintiff received a letter dated 2 April 1999 from the first defendant requesting the plaintiff to instruct her solicitor to prepare the transfer for execution.

G **[27]** It would appear that the heart of the learned judge's finding was that the failure on the part of the third defendant to make any enquiry with regard to the plaintiff's occupation of the said property and to take any action to evict the plaintiff was sufficient to defeat the third defendant's interest in the said property. With respect, we are of opinion that the learned judge fell into error in making such a finding. The alleged failures were insufficient to H establish fraud and/or conspiracy. The elements of fraud and/or conspiracy must be proved by clear, cogent and convincing evidence. There must be something more than mere failure or an omission on the part of the third defendant. There can never be fraud and/or conspiracy cannot exist, where the intent to deceive does not exist.

I

Meaning Of Fraud Within s. 340(2) Of The NLC

[28] The question was comprehensively dealt with by Asmabi binti Mohamad JC (as she then was) in the case of *Asari @ Asha'ari bin Mohd Amin v. Zainalabidin bin Mohamed Husain* [2012] 1 LNS 165 (Civil Action No: S7-22-7-2005). We deem it appropriate to reproduce relevant passages *in extenso:*

> 35. The NLC does not provide the interpretation of the word of fraud and or define what conduct may constitute fraud. The judicial interpretation of fraud which has been consistently followed and adopted by our courts could be found in the case of *Assets Co. v. Mere Roihi* [1905] 1 AC 176 where at page 210 it said:
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> > In *Waimaha Sawmiling Co Ltd v. Waione Co Ltd* [1926] AC 101 at p. 106 Lord Buckmaster observed as follows:
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> > > If the design object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear ...
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> 36. Fraud which is envisaged by section 340 of the NLC is "actual fraud or dishonesty of some sort, not what is called constructive or equitable fraud" (See Privy Council case of *Assets Co. v. Mere Roihi* [1905] 1 Ac 176 per Lord Lindley).
>
> Fraud
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> 37. The law on fraud is well settled. This had been well illustrated in the case of *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136 which states:
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> > As it stands the registered title of the said land in the hands of the second and third appellants is indefeasible. The concept of indefeasibility of title is so deeply embedded in our law that it seems almost trite to restate it. Therefore the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests in land unless the party who acquires the registered title has been guilty of fraud (see section 340(2) (a) of the National Land Code) ...
> >
> > Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie, dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are ... inaccurate: but "fraud" ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled'. (Per Romilly MR in *Green v. Nixon*). (7) Thus in *Waimiha Sawmiling Co Ltd v. Waione Timber Company Ltd*. It was said that 'if the designed object of transfer be to cheat a man of a known existing right, that is fraudulent ...

(*Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ page 81; *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 2 MLJ 196).

38. The case of *Hock Hua Bank (Sabah) Berhad v. Lam Tat Ming & Ors* [1995] 1 LNS 80 states as follows:

> To sum up, fraud implies some base conduct and moral turpitude and a person is taken to have acted fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person. That is what is known, as "fraud" or fraudulently. Further we agree that fraud whether in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion or conjecture.

39. The Supreme Court case of *Chu Choon Moi v. Nga Siew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34 at page 38 states as follows:

> We agree that fraud whether made in civil or criminal proceeding must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the Court or a prudent man considers its existence probable in the circumstances of the case.

(see *Saminathan v. Papa* [1980] 1 LNS 174; *Narayanan v. Official Asignee, Rangoon* [1941] AIR PC 93; *Hock Hua Bank (Sabah) Berhad v. Lam Tat Ming & Ors* [1995] 1 LNS 80; *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229; *Chong Song v. Uma Devi a/p Kandiah* [2011] 2 MLJ 585.

40. In *Tai Lee Finance Co. Sdn Bhd v. Official Assignee & Ors (supra)* the court held that the question whether fraud exists or otherwise is one of fact to be determined based on the facts and circumstances surrounding each particular case. This case further reiterated that the onus lies on the person alleging fraud to prove fraud not on the normal burden placed on the plaintiff in civil case which is on the balance of probabilities but the burden is one which is beyond reasonable doubt.

[29] We agree with the above proposition of law.

[30] Learned counsel for the plaintiff contended that sufficient evidence has been adduced to prove fraud and/or conspiracy on the part of the third defendant. It was submitted that the learned judge had accepted the evidence when he made the following findings:

(i) SD2 (the bank officer) admitted during cross-examination that the sale and purchase price of the said property was RM500,000;

(ii) a verbal valuation showed that the said property was worth RM525,580;

(iii) the third defendant approved a loan of RM760,000 on a land worth RM525,580;

(iv) there was unjust enrichment on the part of the second defendant;

(v) the verbal valuation also stated that the property was a vacant residential lot; and

(vi) the construction agreement dated 21 October 2003 was not tendered by the third defendant during the trial.

[31] The above submission is with respect, misconceived. It is pertinent no note that learned counsel for the plaintiff attempted to allege fraud and/or conspiracy against the third defendant by way of cross-examination of SD2. We are of the view that a mere suggestion in cross-examination without any foundation being laid by way of pleading is unacceptable.

[32] Further, there is hardly any evidence from which fraud and/or conspiracy can reasonably be inferred.

Conclusion

[33] For the foregoing reasons, the finding of the learned judge is clearly wrong in law and the third defendant is entitled to have this finding set aside. Accordingly, we unanimously allowed this appeal and set aside the decision of the High Court. No order as to costs. The deposit was refunded.